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August 28, 1995

BY HAND DELIVERY
Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

[redacted]

DOCKET FILE COPY ORIGINAL

Re: MM Docket No. 95-90
Review of the Commission's Regulations Governing
Broadcasting Television Advertising (Section 73.6358(h) & (i)

Dear Mr. Caton:

On behalf of Pappas Stations Partnership, there are transmitted herewith an original and four copies of its Comments in Opposition in connection with the above-noted proceeding.

If further information is necessary, please communicate with this office.

Very truly yours,

Vincent J. Curtis, Jr.
Counsel for Pappas Stations Partnership

VJC:mah
Enclosure

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FEDERAL COMMUNICATIONS COMMISSION
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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Review of the Commission's	)	
Regulations Governing Broadcast	)	MM Docket No. 95-90
Television Advertising	)	

Directed to: The Commission

COMMENTS IN OPPOSITION
OF PAPPAS STATIONS PARTNERSHIP[1, 2]

Pappas Stations Partnership, through its attorneys, herewith submits its Comments in connection with the above-captioned proceeding initiated by Notice of Proposed Rule Making, FCC 95-226, released June 14, 1995 ("NPRM"). In support, the following is stated:

1. The subject rulemaking, which deals with the "control by networks of station advertising rates" and the "network rep rule" (Sections 73.658(h) and (i), respectively), is one of a series of proceedings (both recently completed and pending) looking toward

[1]Pappas Stations Partnership holds licenses and other authorizations from the Commission to operate television broadcast stations KMPH(TV), Visalia, California; KPTM(TV), Omaha, Nebraska; KPWB-TV, Sacramento, California; and KREN-TV, Reno, Nevada.

[2]In addition to its comments herein, Pappas has signed on to the Comments being filed simultaneously in this docket proceeding by TeleRep, Inc., in its capacity as a client of TeleRep. While the TeleRep Comments provide an historical and legal aspect, these comments supply an anecdotal and empirical perspective that demonstrates the negative impact from the proposed rules.

removing restrictions on networks in their dealings with affiliates.[3] Whether by design or chance, the compartmentalization of these proceedings into individualized issues allows for the lessened consideration of the impact that these combined changes, as proposed, will have not only on the network affiliates involved, but also on the public at large. Similarly, the timing of this proceeding and the review in Docket No. 95-92 during the summer months and with relatively short time tables limit the full discussion and analysis that these most important issues deserve [4]

2. The issues in this proceeding are vitally important to the continuation of the independence of the affiliates and the protection of localism. To eliminate these rules would greatly weaken the independence of the affiliate in its relationship with the network and strengthen the control by the networks over station revenues and programming

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[3] See, e.g., Notice of Proposed Rule Making in MM Docket No. 95-40, FCC 95-145 (released April 5, 1995) (reexamination of rule requiring filing of affiliation contracts) (Filing of Affiliation Contracts NPRM); Report and Order in MM Docket No. 91-221, FCC 95-97 (released March 7, 1995) (repeal of the network station ownership rule and the secondary affiliation rule); Notice of Proposed Rule Making in MM Docket No. 94-123, FCC 94-266 (released October 25, 1994) (reexamination of the prime time access rule); and Notice of Proposed Rule Making in MM Docket No. 95-92, FCC 95-254 (released June 15, 1995) (review of Commission's regulations governing programming practices of broadcast television networks and affiliates).

[4] For example, July and August traditionally are major vacation times, which lead to a slowdown in the ability to gear up for major issues. Also, the requests by the Commission in the NPRM for studies by economists is contradicted by the short time to respond. By the time many parties recognized the importance of these issues, the opportunity to seek additional time had passed.

selection by affiliates.[5] Such controls can lead to the wrecking of affiliates, allowing for their takeover by the networks themselves.[6] The current rules have worked well to protect the independence of the affiliates and to insure freedom to provide local programming. Pappas is concerned as to why this attempt to "fix something that ain't broke" has been put in issue and where the public interest benefits from the proposed elimination of these rules are stated.[7] Age alone is no reason to change a rule that has benefited both the affiliates and the public.

3. The NPRM's basic flaw is its misunderstanding of the industry as it operates in these areas and the considerable existing power of the networks over affiliates. To suggest, as is done in the NPRM, that dealings between networks and affiliates represent arm's-length activity between equals is laughable and unreal. While there were changes in affiliations recently resulting from the Fox - New World scenario,

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[5]Examples of this strength, even at this time, is the recent decision by NBC, acting in its own corporate self-interest, to drop Time Warner's entertainment - news show "Extra" to make room for its own rival show, notwithstanding the fact that the Time Warner show was the number one rated show in its time period. With both PTAR and FINSYN out, NBC will exercise its clout in both filling fringe time on its affiliate stations and through its bartering powers. See, Attachment 1 hereto, Wall Street Journal, Friday, August 25, 1995, p. 11.

[6]The current legislation pending on Capitol Hill already provides a look at what the future can look like. Moreover, it must be recalled that the "weakened" condition of the radio markets was a clear impetus in expanding the limits on ownership.

[7]In the NPRM, at Paragraph 10, in discussing the rejection by the Commission to eliminate these rules in 1990, it is noted that the Commission was concerned as to the combined effect of other proceedings being conducted at the time could have on the industry. NPRM at ¶10. What the NPRM does not say is that the Commission in 1990 also made clear that it did not believe "that the weight of the record evidence or our own experience in this area supports a conclusion that there are public interest benefits sufficient to warrant any changes in the rule." Report and Order in BC Docket No. 78-309, 5 FCC Rd 7280, 7281 (1990).

no one in this industry mistakes who the Eight Hundred Pound Gorilla is in the dance between affiliates and networks. The very important "governors" placed on network activity by the present rules being examined in this proceeding and the proceedings recently concluded or still pending - such as PTAR and FINSYN - give (or in some cases concluded, formerly gave) to the affiliates a legal stepladder to try to reach a level of par in negotiating with the networks. To suggest equality - even with these rules in place - is to fail to understand the reality of the marketplace as it is today.

4. The networks today, through satellite distribution systems, have the capability - which they use - to provide cluster spot sales to serve 40-46 regions throughout the United States. Thus, they are able to compete on a cut-in basis directly with their own affiliates for regional - and national - advertisers on not only a regional basis but on a per-station buy. When combined with their barter powers (since FINSYN is gone), the removal of the rep rule increases the power of the networks to add control over their affiliates.

5. Ignored by the NPRM is the tremendous conflict of interest that would exist with the networks free to rep affiliates, a conflict that the networks would resolve in their favor. National spot sales reps - such as TeleRep - are exclusively representatives of the stations that they have as clients. They are wholly independent and have no conflicts with their representation of these stations. Thus,

- o the national rep has no conflict of interest vis a vis network or local advertising sales.
- o the national rep does not sell barter syndication in combination with national spot.

- o the national rep does not sell network time in combination with national spot.
- o the national rep does not sell cable in combination with national spot and
- o the national rep does not sell print in combination with national spot.

6. The suggestion in the NPRM that eliminating the rep rule would give to affiliates additional sources of representation and cost savings is flawed for two basic reasons. First, with the restrictions removed, every affiliation agreement will inevitably require affiliates to use their network as the national rep. To believe otherwise is to ignore reality. At the very least, there would be the threat of lower network compensation if a station failed to use the network as its national rep. It would be a severe hammerlock on the affiliates who would have no choice but to give in. Secondly, in addition to the conflicts listed above - which would place the affiliates at the mercy of the networks' then current project - the loss of business by the existing national spot sales reps would make them susceptible to takeovers by the existing national networks.[8] At the very least, most of these independent rep businesses will be forced to close, further cementing the networks' control and concentrating the marketplace.[9]

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[8]Interestingly, there are today only six (6) national reps (Blair, Katz (SELTEL), TeleRep, Petry, MMP and Adam Young) and six (6) national networks (ABC, CBS, NBC, FOX, UPN and WB).

[9]An example of this concentration of market power could be found in a scenario with Disney (Cap Cities) having the following inventory and ability to provide representation: network time, regional cut-ins, barter syndication, advertising on cable networks (e.g., ESPN, ESPN2, A&E, and Lifetime), newspapers, magazines, interactive media (Disney is a co-partner with three telcos) and ability to package promotions at their theme parks.

7. The marketplace today is free, and it is efficient. There is no evidence that the networks would be able to bring further savings to the stations. In fact, it can be assured that the oligopolistic control that the networks would enjoy would guarantee that the affiliates would get less for their buck.[10] Given this unfettered power, the networks would be fools not to exercise it, especially in light of the competition that would exist with other networks.

8. Today, and just as Congress and the Commission decreed, the affiliate enjoys a certain freedom of choice as to programming. Recently, Pappas' station KPWB(TV) in Sacramento launched a Morning News Show from 6:00 to 9:00 a.m. and pre-empted barter programming.[11] To suggest that affiliates will retain their ability to pre-empt network or network-supplied barter programming with conditions of advertising sales dictated by the networks and with the network as not only the syndicator, but also the rep, is to fail to recognize the dangers of this concentration. Further, networks, with PTAR and FINSYN gone, could, in time, end third party barter syndication, since they could control both ends of the barter syndication agreements (i.e., the production end and advertising sales end).[12]

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[10]The old saying that "power corrupts and absolute power corrupts absolutely" would find new life.

[11]The cost to Pappas was substantial. Capital costs in 1995 alone will run $3 million and operating costs $1.5 million. Similarly, KTLA(TV) is currently running the number one morning news program in Los Angeles. With the rules eliminated, the pressures on KPWB(TV), KTLA, or any other station to conform to network decisions would be enormous.

[12]There is an argument that since there are many more outlets of video service the control by the network is lessened. This ignores the fact that many of these new outlets are controlled or at least have substantial interests held by networks (see, e.g., the Disney/Cap Cities example above).

9. Moreover, to give the networks control over the setting of non-network advertising rates on affiliate stations would not only change the way the industry is run today, it would essentially give total power of the purse strings to the networks. First of all, contrary to the inference in the NPRM, the independent reps do not set rates for their clients. While there obviously is consultation, the station is free to and does set its own rates. Thus, to give the networks this ability would be a substantial and totally unacceptable change in the industry. Furthermore, to give the control of a station's right to set rates to a third party (particularly the networks who have substantial and unacceptable conflicts of interests) would be to give away the lifeblood of a local station, which would immediately lose its independence. The Commission has since its inception held faithfully to the bedrock policy that a licensee must be free and independent to program for its community. To turn the very sustenance of a station - its advertising rates - over to the networks would be to abandon that policy and remove the most vital link of independence for an affiliate - control over its revenues. Without that control, the networks - for long range strategic reasons - could force affiliates to "overcharge" on non-network advertising rates,[13] thus weakening the affiliates' position and making them more subservient to the networks.

Conclusion

In conclusion, Pappas urges the Commission to retain both the "network rep" and "non-network rate" rules in their current form. These rules have worked well for many years to protect the independence of affiliates and localizing of programming for the

[13]In contrast, the network rates would appear more attractive. Combined with their ability to cluster regional spots, it does not take much to recognize the control element involved.

public. Nothing has changed but the increased opportunity for networks (particularly through mergers with major studios) to detrimentally affect both of these goals. The elimination of these rules could speed this unacceptable end.

To quote another old saying (the "Golden Rule"), he who has the gold makes the rules. Instead of the public interest, only this Golden Rule would apply were the Commission to make the unwise decision of eliminating the rules under consideration. To this end, Pappas respectfully requests that the Commission reject the proposal to eliminate the provisions of Section 73.658(h) and (i).

Respectfully submitted,

PAPPAS STATIONS PARTNERSHIP

By: ______________________
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August 28, 1995

ATTACHMENT NO. 1

ARTICLE FROM *THE WALL STREET JOURNAL*

MARKETING & MEDIA

NBC Will Drop Time Warner TV Show

'Extra' to Be Scrapped in '96 As Network Sets Plans To Develop Own Show

By ELIZABETH JENSEN And EBEN SHAPIRO
Staff Reporters of THE WALL STREET JOURNAL

NEW YORK – **General Electric** Co.'s NBC, moving aggressively to enter the lucrative syndicated-television business, said it will drop **Time Warner** Inc.'s "Extra" in fall 1996 to make room for NBC's own rival entertainment-news show.

The move is a stark sign of the new competitive dynamics in television, where networks for the first time are allowed to get into the business of producing and distributing shows for any buyer. NBC's decision deals a major blow to Time Warner's Warner Bros. studio, which had invested heavily in "Extra" in a bid to establish a beachhead in the precious time slot just before prime-time.

In place of "Extra," NBC plans to carry its own entertainment newsmagazine, which it is developing with **New World Entertainment Group** Inc.'s TV production arm. NBC recently struck a joint production deal with New World, as a way to keep New World-owned TV stations from defecting to another network.

NBC's decision comes as Time Warner steps up its effort to capture TV-distribution outlets, and avoid precisely the fate of "Extra," by linking with a big broadcaster. Indeed one option before Time Warner, amid a frenzy of current media-industry talks, is a strategic alliance with NBC, according to people familiar with the situation.

'Everybody is talking to everybody," said a leading media investment banker yesterday, repeating verbatim an observation by several media executives and investors.

Time Warner considered an investment in the NBC network a year ago, but talks broke down over issues of control. But this month Time Warner Chairman Gerald Levin and GE Chairman John Welch have personally renewed informal talks about possible ties between the two companies, say people familiar with the discussions. Officials at Time Warner, NBC and GE declined comment on the reported talks.

'Not Surprised'

Attributing the NBC move on "Extra" to "the new dynamics" in the entertainment industry, Scott Carlin, executive vice president of Warner Bros.' domestic television distribution, said: "We're certainly disappointed, but not surprised."

The loss of the NBC outlets underscores the importance to suppliers like Warner Bros. of securing access to major outlets such as the networks. With the NBC move, "Extra" is losing outlets in New York, Los Angeles, Chicago and Philadelphia, where the show ran in the slot right before prime-time.

Mr. Carlin said the show's ratings are growing, and that Warner expects to find other stations to carry "Extra." But John Rohrback, president of the NBC Owned Stations group, said, "It would surprise me" if the NBC move didn't prove fatal to "Extra."

Despite the possibility of new high-level links between NBC and Time Warner, the "Extra" cancellation exacerbates tension between the two companies over TV programs.

NBC declined to purchase any Warner Bros.-produced TV shows for its network in the coming season. That upset Warner Bros., since the studio last season provided the network with "E.R." and "Friends," two of NBC's biggest hits.

Power Struggles

NBC said Warner simply didn't develop any shows it wanted, but there are also power struggles over the colliding interests of programmers and broadcasters. In January Warner launched its own network, WB, to guarantee that it would still have an outlet for its shows. That led NBC West Coast President Don Ohlmeyer to declare that he is reluctant to buy shows from Warner, for fear that WB will snatch them back after they become hits.

"There's no feud," NBC Entertainment President Warren Littlefield insisted yesterday, adding the two companies are discussing a number of "major" projects. "If there were any past problems, they are not evident today," said a Warner Bros. representative.

NBC remains the center of a whirlwind of other speculation, including reports that Ted Turner is trying to strike a deal with the network, with help from Time Warner and possibly funding from **Microsoft** Corp. Other reports link Mr. Turner to **CBS** Inc.

Mr. Turner has repeatedly declined to comment. Microsoft Chairman Bill Gates has sought to play down reports of a Turner investment, without ruling them out altogether. "There are interesting ways that two companies come together and tie their fortunes together," said Mr. Gates at a news conference at Microsoft's Redmond, Wash., headquarters yesterday for the gala launch of Windows 95. But he added: "Any kind of arrangement will probably fall short of the levels people have imagined."

Nevertheless, NBC's "Tonight Show" host Jay Leno, on hand in Redmond for the Windows festivities, joked that NBC now stands for "Now Bill-Compatible."

Mr. Leno watched Mr. Gates show off a new pinball game that will come with the software's CD-ROM version and quipped: "What do you say we go backstage and play two out of three? The winner gets NBC."